STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 12, 2005
v	No. 253080 Montcalm Circuit Court
CHARLES MARION WALDRON, JR., Defendant-Appellant.	LC No. 02-000719-FC

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f). Defendant was sentenced to three concurrent terms of thirty to sixty years' imprisonment. We affirm.

The victim met defendant in a bar. Although she did not know defendant, she accepted his offer to give her a ride home. At one point as they were driving, the victim told defendant that he was going the wrong way. Defendant then repeatedly struck the victim in the head, eventually knocking her unconscious. The next thing the victim remembers, she was lying in the grass with defendant on top of her, penetrating her vagina with his penis. While he was raping her, defendant bit the victim on her right breast around the outside of the nipple, biting hard enough to leave a mark. Defendant then turned the victim over and brutally forced an unknown object up her rectum. The next thing that the victim felt was defendant's hand up inside her rectum. She explained that it felt like he was trying to pull her organs out. After taking a ring off the victim's ring finger, defendant kicked her. Thinking that he was checking to see if she was still alive, the victim lay still, playing dead.

After defendant left, the victim struggled to a nearby home. One of the paramedics responding to the homeowner's call for help testified that the victim's condition was unlike anything he had ever seen. The attending surgeon testified that his external examination prior to surgery revealed that the victim's rectum "was split out to a distance of ten centimeters." The surgeon subsequently discovered that the victim's sigmoid colon had a very large hole in it and was torn away from the back side of the abdominal cavity, along the sacrum, showing very severe injury and lots of contamination. The surgeon testified that he had never seen a penetration of the rectum injury like this before. A diverting colostomy was performed and a large portion of the victim's sigmoid colon was completely removed. The victim testified that her doctors hoped to be able to later reverse the colostomy, but there was no guarantee.

Defendant first argues that the trial court erred in excluding from evidence a telephone log prepared by Michigan State Police forensic scientist Michelle Marfori. "The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Where a decision regarding the admission of evidence involves whether a rule of evidence precludes admission of the evidence, the issue of law is reviewed de novo. *Id*. Further, error may not be based on a ruling that excludes evidence unless a substantial right of the party is affected. MRE 103(a). An error that affects substantial rights is one that is outcome-determinative. *People v Parcha*, 227 Mich App 236; 575 NW2d 316 (1997).

Montcalm County Sheriff's Department Officer Thomas Goerge testified that on October 4, 2002, he picked up swabs taken from the bite marks on the victim's breasts and delivered them to the Michigan State Police laboratory in Grand Rapids. Montcalm County Sheriff's Department Detective Lewis Corwin similarly testified that an evidence log that he prepared indicated that the bite mark swabs went to the lab on October 4, 2002. Marfori also testified that she received the bite mark samples on October 4, 2002. Marfori tested the DNA samples and concluded that they were consistent with DNA samples taken from defendant.

During trial, defense counsel attempted to admit the telephone log prepared by Marfori. Defense counsel argued that the log indicated that she did not receive the samples until October 10, 2002. Counsel explained that he sought to admit the log under both the public record and business record exceptions to the hearsay rule, MRE 802(6) and (8), to discredit Marfori. The court ruled that the document did not fall within a hearsay exception and was not admissible. Defendant moved for reconsideration, but the court denied the motion, concluding that the log was a document prepared in anticipation of litigation.

We disagree with the trial court that the telephone log is inadmissible because it is a report prepared for the purposes of litigation. Clearly, the log is hearsay, MRE 801(C), and was created by law enforcement personnel at a public office, thereby raising the possibility of preclusion under MRE 803(8). However, it was not created to establish an element of the crime of which defendant was charged. See *McDaniel*, *supra* at 413. Rather, Marfori testified that she created the log during the course of her regular business activity while working at a public office. We conclude that the document qualifies as a "routine police reports made in a nonadversarial setting," *Solomon v Shuell*, 435 Mich 104, 144-145 n 9; 457 NW2d 669 (1990), and, further, as a record of events made at the time by a person with knowledge, kept in the course of a regularly conducted business activity, as shown by the testimony of the custodian, MRE 803(6).

However, because the court's preclusion of the evidence did not affect a substantial right of defendant, the error was harmless. MRE 103(a). While defendant sought to discredit Marfori by showing that there was a discrepancy in the date when the samples were submitted to her laboratory – October 4 versus October 10 – Marfori explained that her October 10 notation was not conclusive of the date of submission. She explained that she wrote down the notation, punctuated with a question mark, because Detective Corwin could not recall the exact date the samples were submitted. This one uncertainty could not have significantly discredited Marfori given that she and Officer Goerge, two people with first-hand knowledge of the samples, testified that Marfori received the samples on October 4.

Defendant next argues that the prosecutor committed error requiring reversal in her closing argument when she stated, "we got the right guy. We got the defendant," because use of the term "we" constitutes error requiring reversal given that it is an inappropriate attempt to link the prosecutor's case with the police and the jury and because the prosecutor's statements amounted to her personally vouching for the correctness of the case. As in this case, where defendant fails to raise a timely objection, appellate review of allegedly improper prosecutorial remarks is generally precluded because the trial court is otherwise deprived of an opportunity to cure the error, unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge, the prestige of his office, or as part of the jury's civic duty. *People v Matuszak*, 263 Mich App 42, 54-56; 687 NW2d 342 (2004). The prosecutor's statements in this case were arguably improper. However, these isolated remarks did not rise to the level of error requiring reversal. Any prejudice that may have occurred was not so egregious that a prompt curative instruction could not have cured it. Accordingly, defendant has failed to demonstrate plain error affecting his substantial rights with regard to the prosecutor's statements during closing argument.

Defendant next argues that it was plainly erroneous for the judge to permit the jury foreman to decide that the jury would only re-hear a portion of the victim's testimony. However, defendant fails to cite any authority for this contention. A bald assertion without supporting authority is insufficient to present an issue for our consideration. *People v Noble*, 152 Mich App 319, 328; 393 NW2d 619 (1986), overruled on other grounds *People v Lively*, 470 Mich 248; 680 NW2d 878 (2004).

Nevertheless, we note that the jury did hear the victim's entire testimony, including questioning by counsel for both sides, when she testified on the first day of trial. Under these circumstances, we fail to see how the jury's failure to sit through the entire recording of testimony that they already heard during trial was plain error that prejudiced defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Next, defendant objects to the following statements in his presentence investigation report (PSIR): "A person is not born to be such an evil and violent man. Did his resentment begin in his childhood? Was this rage created in Vietnam? Whatever turned the defendant into such a brutal individual no one may ever know." Defendant argues that these statements were improper because a probation officers' injection of personal opinion into a PSIR should not be condoned and only licensed mental health personnel may comment on a defendant's mental health in a PSIR. We disagree that any error occurred.

The purpose of the PSIR is to give the sentencing court as much information as possible so that the sentence can be tailored to the circumstances. *People v Potrafka*, 140 Mich App 749, 751; 366 NW2d 35 (1985). Among other things, a PSIR must include a specific recommendation for disposition of the defendant. MCL 771.14(2). The trial court's response to a claim of error in a PSIR is reviewed for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

We conclude that the trial court did not abuse its discretion in refusing to redact the objected to comments. The court rightly concluded that the probation officer's comments were not improper because they were made as explanation to support her sentencing recommendation. The court clearly appreciated that the probation officer was not rendering any type of mental health assessment that was properly within the province of a licensed mental health professional. Rather, the court understood that the probation officer was making the comments to lend support to her belief that defendant's actions were beyond reasonable comprehension and thus justified her sentencing recommendation.

Defendant last argues that the trial court erred in setting defendant's minimum sentence at thirty years when the sentencing guidelines call for a minimum sentence of only 135 to 225 months, or 11.25 to 18.75 years. According to defendant, this substantial upward departure was disproportionate. We disagree. Defendant also asserts that the sentence violates the two-thirds rule of MCL 769.34(2)(b), and that § 34 is constitutionally infirm. We will address these latter challenges after first addressing defendant's proportionality argument.

"A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion." *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995).

Based on the sentencing guidelines, defendant's offense variable score was 140 and he fell within C-VI on an A grid, making his guideline minimum range 135 to 225 months, i.e., 11.25 to 18.75 years. See MCL 777.62. The PSIR recommended a minimum sentence range of twenty-five years to fifty years, and the trial court sentenced defendant to a minimum of thirty years. Relying on *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), the court concluded that there were objective and verifiable reasons that were substantial and compelling justifying a departure from the sentencing guidelines. The court first noted that defendant left the victim in the woods to die. The court then noted the willfulness of defendant's actions and the "extreme nature of the injuries" suffered by the victim. The court further noted that the victim's injuries were both life threatening and permanent. The court also noted the emotional and financial impact on the victim's family. The court continued by noting defendant's history of resentment toward women and his prior abusive relationships. Last, the court noted the psychological impact on the victim. The court then stated, "Based on the entire circumstances of this situation, I am going to sentence the defendant outside the guidelines in this particular case. His willful behavior in the whole case is reprehensible to the utmost degree."

We agree with the trial court's characterizations and decision. The trial court fulfilled its obligation to articulate its substantial and compelling reasons for its upward departure from the sentencing guidelines on the record. MCL 769.34(3); *Babcock*, *supra* at 258-259. The reasons articulated by the court in this exceptional case constituted substantial and compelling reasons that were objective and verifiable, that keenly grab one's attention, and were of considerable worth in deciding the length of a sentence. *Id.* at 257-258. The trial court properly articulated the reasons why it concluded that the characteristics of the subject attack were given inadequate weight in determining the guidelines range. MCL 769.34(3)(b); *Babcock*, *supra* at 258 n 12. In this case, the manner of the subject attack was designed to inflict maximum harm. *Id.* Given the severity of the crime, the sentence was proportionate to the seriousness, willfulness, and depravity of defendant's conduct. *Id*. at 262-264; see *People v Marshall*, 204 Mich App 584,

588-589; 517 NW2d 554 (1994). The trial court did not abuse its discretion in determining that a significant upward departure from the sentencing guidelines was appropriate.

We also see no merit to defendant's argument that the sentence imposed violates the two-thirds rule of MCL 769.34(2). Defendant seems to be arguing that because the minimum sentence exceeds two-thirds of his minimum life expectancy, the sentence violates the statute. We disagree. Section 34(2)(b) provides that a "court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the statutory maximum sentence." MCL 769.34(2). The clear language of the statute measures the minimum sentence against the statutory maximum, not the defendant's life expectancy.

Defendant's constitutional challenge is also without merit. In addition to not providing any supporting authority, defendant fails to establish that the discretion to depart granted in MCL 769.34(3) constitutes an "abdication" of legislative authority. As just noted, the two-thirds rule of MCL 769.34(2)(b) limits a sentencing court's discretion in that it ties the minimum to the statutorily proscribed maximum for any given offense. Further, the guidelines are based on the principle of proportionate sentencing. *Babcock, supra* at 263-264. Accordingly, "in departing from the guidelines range, the trial court must consider whether its sentence is proportionate to the seriousness of the defendant's conduct and his criminal history because, if it is not, the trial court's departure is necessarily not justified by a substantial and compelling reason." *Id*. at 264.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Pat M. Donofrio